United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1789

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH SCIARRINO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLANT

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[redacted]

INDEX

	Page
Issues presented	1
Statement	1
Argument:	
I THE TRIAL COURT PROPERLY RULED THAT APPELLANT'S FALSE DECLARATION BEFORE THE GRAND JURY WAS MATERIAL	5
II APPELLANT WAS NOT ENTRAPPED INTO COMMITTING PERJURY	8
Conclusion	10
Certificate of Service	10

C I T A T I O N S

Cases:

Brown v. United States, 245 F.2d 549 (8th Cir. 1957)	9
Carroll v. United States, 16 F.2d 951 (2nd Cir. 1927), certiorari denied, 273 U.S. 763 (1927)	6
Masina v. United States, 296 F.2d 871 (8th Cir. 1961)	9
United States v. Alu, 246 F.2d 29 (2nd Cir. 1957)	6, 8
United States v. Fiorillo, 376 F.2d 180 (2nd Cir. 1967)	6, 9
United States v. Freedman, 445 F.2d 1220 (2nd Cir. 1971)	6
United States v. Lazaros, 480 F.2d 174 (6th Cir. 1973), certiorari denied, No. 73-624, decided February 19, 1974	9
United States v. Marchisio, 344 F.2d 653 (2nd Cir. 1965)	6

Cases Continued:

United States v. McFarland, 371 F.2d 701 (2nd Cir. 1966), certiorari denied, 387 U.S. 906 (1967)----- 6, 7

United States v. Remington, 208 F.2d 567 (2nd Cir. 1953), certiorari denied, 343 U.S. 907---------- 9

United States v. Stone, 429 F.2d 138 (2nd Cir. 1970)--- 6, 7

United States v. Winter, 348 F.2d 204 (2nd Cir. 1965), certiorari denied, 382 U.S. 955 (1965)---------- 6

Statutes:

18 U.S.C. 1073---------- 4

18 U.S.C. 1623---------- 1, 5

18 U.S.C. 1623(a)--- ---------- ---------- 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1789

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH SCLAFANI,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

1. Whether the trial court properly ruled that appellant's false declaration before the grand jury was material.

2. Whether appellant was entrapped into committing perjury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, appellant was convicted of having made a false declaration before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to three years' imprisonment.

The evidence at trial showed that in the early morning hours of April 11, 1973, F.B.I. agents began a stake-out at a

three-family house at 1564 Benson Avenue, Brooklyn. The agents had information that two state fugitives, Peter Salanardi and Nicholas Mussolino, for whom federal arrest warrants were outstanding, might come to that location (Tr. 61-63). Federal agents in unmarked vehicles were positioned where they could observe both the front and rear of the building (Tr. 64, 128).[1/]

At 1:45 a.m. F.B.I. Agent Charles Avakian, who was stationed in a van across the street from 1564 Benson, saw appellant drive up in a black Oldsmobile Toronado and park in front of the apartment house.[2/] As Agent Avakian watched, appellant left the car and entered the ground floor apartment (Tr. 62-63). After checking with F.B.I. headquarters, the agents learned that the Oldsmobile's description and license plates matched those of a car which was leased to appellant (Tr. 72).

1/"Tr." refers to the two-volume trial transcript.

2/At trial Agent Avakian identified appellant in court as the man he had seen entering the apartment (Tr. 62). The agent testified that illumination from nearby street lamps had enabled him to see appellant's face as he parked the car and walked to the house. Before trial the agent selected appellant's photograph from a group of seven which another agent had showed him (Tr. 64-65, 72-73). After examining the photographs, the trial court found that the identification procedure was not impermissibly suggestive (Tr. 73-80). However, the court ruled the government could not introduce the photograph of appellant into evidence, because it was a mug shot and might prejudice the jury (Tr. 82). The trial judge told defense counsel that he would order the government to alter the photograph of appellant to conceal the fact that it was a mug shot, if appellant wished to use the photograph on cross-examination (Tr. 81). However, defense counsel did not take advantage of the offer.

At 10:48 a.m. F.B.I. Agent Gunnar Askeland, who was maintaining surveillance in the van where Agent Avakian had been stationed earlier, saw appellant emerge from 1564 Benson, empty a bag of garbage into a trash can, and drive away (Tr. 111-113, 120-121).[3]

Federal agents continued their stake-out. At 7:30 p.m. agents saw the two fugitives, Salanardi and Mussolino, leaving the yard behind 1564 Benson Avenue by jumping over a low wall. Mussolino was taken into custody, but Salanardi eluded pursuing agents (Tr. 133, 161-166).[4]

Appellant had leased the ground floor apartment at 1564 Benson Avenue in July 1967 and continued to pay rent through April 1973. When appellant paid the last two months' rent, he told the landlord that some people whose house had burned would be living temporarily in the apartment (Tr. 172-177).

On April 16, 1973, appellant was interviewed by federal agents at an F.B.I. office in Manhattan. He denied knowing Salanardi and Mussolino and said that to the best of his knowledge they had never stayed in his apartment at 1564 Benson (Tr. 216).

On August 8, 1973, appellant was called as a witness before a federal grand jury which was conducting an investigation

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3/Agent Askeland identified appellant in court as the man he saw leaving the house. The agent testified that he had observed appellant in bright daylight as he walked to his car (Tr. 113).

4/Salanardi has never been apprehended.

to determine whether violations of 18 U.S.C. 1073 (flight to avoid prosecution) and other federal criminal statutes had been committed in the Eastern District of New York. He testified that in March 1973, he had sublet his apartment at 1564 Benson to a woman called Louise whose last name he believed was either DeMateo or Mateo. According to appellant, the woman remained in the apartment two months. Appellant stated that he only went to 1564 Benson twice while he was subletting -- both times to collect the rent. Appellant further testified that he did not enter the apartment on those occasions, but simply stood at the door for five or ten minutes while Louise got the rent money (Tr. 45-50).

On September 26, 1973, appellant was again summoned before the grand jury, which was still probing possible interstate flight to avoid prosecution. The prosecutor questioned him as follows (Tr. 58-60):

Q The question was asked whether or not you were in that apartment after April 1st, 1973. Were you in that apartment after April 1, 1973?
A No.
Q You were never in that apartment?
A No.
Q The building is located where?
A Third house off the corner on Benson Avenue.
Q What is the address?
A 1564.
Q Specifically, were you in that building on April 11, 1973?
A That building?
Q Right.
A Not to the best of my knowledge.
Q Did you go into that building at approximately 1:30 A.M. on April 11, 1973?
A I don't think so. I doubt it very much.

Q Did you leave the building at approximately 10:48 A.M. and prior to your leaving the building, did you empty the garbage?
A If I wasn't in the building, how could I?
Q I'm asking you yes or no.
A To the best of my knowledge, no. I don't think I was even there. I could have been in the area because my mother-in-law lives across the street.
Q But you were never in that building on April 11, 1973?
A No, not to the best of my knowledge.
Q April 11, 1973, is that the date Nicholas Mussolino was arrested?
A April what?
Q 11th, 1973. Do you remember that date?
A No, I don't.
Q Were you in that apartment, did you go to the apartment, to the building itself? Did you go to the building of 1564 Benson Avenue after you sublet the apartment?
A (Witness nods head.) Well, I went to the building to pay the rent.
Q But you were never in the apartment?
A Not in the apartment. To the door.
Q Did you ever stay in that building for a period exceeding one hour after you sublet the apartment?
A No.

ARGUMENT

I

THE TRIAL COURT PROPERLY RULED THAT APPELLANT'S FALSE DECLARATION BEFORE THE GRAND JURY WAS MATERIAL

18 U.S.C. 1623 provides that a false declaration before a grand jury must be material to constitute an offense.[5/] Materiality is a question of law to be determined by the court, not one of fact

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5/18 U.S.C. 1623(a) provides in part:

> Whoever under oath in any proceeding before or ancilliary to any court or grand jury of the United States knowingly makes any false material declaration ... shall be fined not more than $10,000 or imprisoned not more than five years, or both [emphasis added].

for the jury. Carroll v. United States, 16 F.2d 951, 954 (2nd Cir. 1927), certiorari denied, 273 U.S. 763 (1927); United States v. Alu, 246 F.2d 29, 32 (2nd Cir. 1957); United States v. Marchisio, 344 F.2d 653, 665 (2nd Cir. 1965); United States v. Winter, 348 F.2d 204, 211 (2nd Cir. 1965),certiorari denied, 382 U.S. 955 (1965); United States v. McFarland, 371 F.2d 701, 703, fn. 3 (2nd Cir. 1966), certiorari denied, 387 U.S. 906 (1967); United States v. Fiorillo, 376 F.2d 180, 184 (2nd Cir. 1967); United States v. Stone, 429 F.2d 138, 140 (2nd Cir. 1970); United States v. Freedman, 445 F.2d 1220, 1226, fn. 10 (2nd Cir. 1971).

Here, the indictment alleged that appellant made a material false declaration before the grand jury on September 26, 1973, when he answered "no" in response to the question, "did you ever stay in that building for a period exceeding one hour after you sublet the apartment?" The trial court ruled that appellant's response -- which, when read in context, amounted to a denial that he was at 1564 Benson on the day when Salanardi was seen fleeing from the back yard -- was material in that it foreclosed further inquiry by the grand jury which might have led to information concerning Salanardi's whereabouts (Tr. 227-230).

The test of materiality is whether the false testimony has the natural effect or tendency to impede, influence, or dissuade the grand jury from pursuing its investigation. Carroll, supra, at 953; Marchisio, supra, at 665; McFarland, supra, at 703. A grand jury's

investigation is not completely fulfilled until every available clue has been run down and all witnesses examined in every proper way to determine whether a crime has been committed; the probe proceeds step by step and a false statement by a witness, even if not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material if it tends to influence or impede the course of the investigation. Stone, supra, at 140. Materiality need be established only as of the time the witness' answers were given, since it refers merely to the relationship between the interrogation and the grand jury's objective at the time. McFarland, supra, at 703-704.

Applying that standard here, there is no reason for this court to overturn the trial court's finding of materiality. Appellant's testimony denying his nine-hour visit to the apartment on April 11, 1973, manifestly impeded the grand jury's investigation of Salanardi's flight. The district court concluded that if appellant had admitted his presence at the apartment, subsequent questioning before the grand jury might have developed evidence bearing on Salanardi's activities. Appellant's reluctance to admit that he was at 1564 Benson on April 11, 1973, understandably suggested to the grand jury that he had concealed Salanardi in his apartment on the date. In those circumstances, the question concerning the duration of appellant's visits to the apartment was germane to the subject matter under investigation and appellant's lying response thwarted the grand jury in its efforts to ascertain

Salanardi's current whereabouts.[6] See Alu, supra, at 33.

II

APPELLANT WAS NOT ENTRAPPED INTO COMMITTING PERJURY

Appellant asserts that he was entrapped as a matter of law into giving false testimony before the grand jury. He alleges that the government recalled him before the grand jury -- not for any legitimate investigative purpose connected with the Salanardi probe -- but merely to lay the foundation for a perjury indictment. He further suggests that the government entrapped him into giving false testimony by urging him to give yes or no answers even though his recollection was dim.

These contentions are without merit. Appellant was initially summoned before the grand jury on August 8, 1973, because he was at 1564 Benson for nine hours on the day Mussolino and Salanardi fled over the wall behind that dwelling. After appellant falsely testified in his initial grand jury appearance that he last visited the apartment on April 1, 1973, he was recalled as a witness the following month and afforded another opportunity to tell the truth. This time the prosecutor specifically called appellant's attention to April 11, 1973, and mentioned the times at which the agents had seen him come and go. However, appellant, in the response cited in the indictment, persisted in falsely denying his presence at

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6/The grand jury's foreman testified that an objective of the grand jury's investigation was to determine Salanardi's whereabouts (Tr. 24).

1564 Benson. His reluctance to give a "yes" or "no" answer, which necessitated persistent questioning by the prosecutor, can reasonably be interpreted as reluctance to testify rather than a genuine failure of memory.

Despite appellant's claim of entrapment there is no indication that the government instigated the false testimony or implanted the idea of lying in appellant's mind. Appellant was under compulsion to tell what he knew, but he was not forced, induced, or coerced into giving false testimony before the grand jury. See Fiorillo, supra, at 184; United States v. Lazaros, 480 F.2d 174, 179 (6th Cir. 1973), certiorari denied, No. 73-624, decided February 19, 1974. See also United States v. Remington, 208 F.2d 567, 570 (2nd Cir. 1953), certiorari denied, 343 U.S. 907.

Neither Brown v. United States, 245 F.2d 549 (8th Cir. 1957) nor Masina v. United States, 296 F.2d 871 (8th Cir. 1961), relied on by appellant, supports the claim of entrapment. In Brown the Eighth Circuit reversed a defendant's perjury conviction for lack of materiality where the grand jury before which he testified was investigating an offense committed in another judicial district and outside the grand jury's jurisdiction; here, of course, the grand jury before which appellant appeared was probing events within its own district and the questioning was material. In Masina the court of appeals rejected the claim of a defendant who, like appellant, asserted that the government had called him before the grand jury, not to secure evidence material to a legitimate inquiry, but for the

purpose of trapping him into testimony similiar to a previous statement in order to establish a basis for a perjury charge.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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SEPTEMBER 1974.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Brief for Appellee have been mailed to Martin Light, Esquire, 66 Court Street, Brooklyn, New York, counsel for appellant.

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DATED: 9/17, 1974

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